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## An Analysis of Haitian Requests for Political Asylum After *Haitian Refugee Center v. Civiletti*

An alien who seeks political asylum in the United States may face serious problems in attempting to remain here. To remain in this country in political asylum, an alien must establish a well-founded fear of persecution if returned to his or her home country.<sup>1</sup> Courts additionally have required an alien to show involvement in political action and fear of persecution because of that action. Courts, however, have not defined explicitly the timing or form of political action necessary to support an asylum claim.

Problems faced by Haitians seeking political asylum here illustrate the difficulties encountered by large groups of aliens attempting to remain in the United States as political refugees. Many Haitians seek asylum here, only to be returned to Haiti.<sup>2</sup> Those who are returned to Haiti may face severe punishment for having claimed asylum abroad, for having left Haiti in contravention of Haitian law, or for having taken part in "political" activity before leaving Haiti—activity that may not be considered political in the United States. Traditionally, none of these bases of persecution would justify a claim of political asylum.

In *Haitian Refugee Center v. Civiletti*,<sup>3</sup> Judge King examined conditions in Haiti, concluding that some acts not conventionally considered political may, in the peculiar context of Haitian culture, be political.<sup>4</sup> Although Judge King examined these conditions only as a preface to his examination of the processing of asylum requests in the United States, and his conclusions are only dicta, his opinion is nevertheless important. By taking into account the particular conditions in an alien's home country, Judge King's conclusions broaden the scope of both the timing and form of political action that may provide the basis for a claim of political asylum.

This Comment analyzes the expanded bases of political action provided by *Haitian Refugee Center*. First, to provide a foundation for the analysis that follows, the immigration laws concerning political asy-

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1. 8 U.S.C. § 1158 (Supp. IV 1980) (asylum); *id.* § 1253(h) (1976 & Supp. IV 1980) (relief from deportation).

2. It is estimated that more than 17,000 Haitians currently are in the United States. See text accompanying notes 88-89 *infra*.

3. 503 F. Supp. 442 (S.D. Fla. 1980), *aff'd as modified sub nom.* *Haitian Refugee Center v. Smith*, 676 F.2d 1023 (5th Cir. 1982).

4. *Id.* at 510.

lum conditions in Haiti and the procedural context and holding of *Haitian Refugee Center* are discussed. The Comment then examines the dual requirement of political persecution and political action. Using the framework suggested by Judge King, the Comment discusses conventional definitions of the form and timing of political action and offers an expanded view of timing, which includes actions taken after departure from the home country, and of form, which includes actions based on economics or on personal encounters.

The Comment concludes that *Haitian Refugee Center* could provide the conceptual basis for a more general standard of political asylum. The traditional function of political asylum is to provide individuals with a legitimate residential status when some political activity prior to departure from their home country would cause the alien to be persecuted upon return. The expanded concept of political asylum found in *Haitian Refugee Center* could break down the traditional, narrowly defined mechanism of political asylum and allow many refugees who could not satisfy traditional requirements to obtain asylum.

While broadening the concept of political asylum to include refugees such as Haitians is one method of ensuring their freedom from persecution, it would be preferable to enact special legislation allowing the refugees to remain in the United States. The valid purposes of a provision concerning political asylum should not be distorted through judicial interpretation of ambiguous statutory language in order to provide asylum for aliens whose suffering is caused by governmental actions not conventionally considered political. Instead, it should be recognized that such persecution should be prohibited under general concepts of the right of humans to freedom from persecution.

### Immigration Laws: Political Asylum and Withholding of Deportation

Before World War II, no specific law governed the admission of refugees.<sup>5</sup> After the war, the United States participated in international efforts to solve refugee problems, enacting legislation for the admission of refugees to the United States.<sup>6</sup> In 1950, Congress enjoined the Attor-

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5. I C. GORDON & H. ROSENFELD, IMMIGRATION LAW AND PROCEDURE, §§ 2.24Aa, 2.3i (1981) [hereinafter cited as GORDON & ROSENFELD]. For a discussion of the history of the immigration laws, emphasizing provisions made for political and religious refugees, see Evans, *The Political Refugee in United States Immigration Law and Practice*, 3 INT'L LAW. 204 (1969).

6. Legislative enactments included: Displaced Persons Act of 1948, ch. 647, 62 Stat. 1009, amended by Act of June 16, 1950, ch. 262, 64 Stat. 219, and Act of June 28, 1951, ch. 167, 65 Stat. 96 (allowed entry of more than 400,000 refugees, charging the numbers to the immigration quotas); Refugee Relief Act of 1953, ch. 336, 67 Stat. 400 (allowed admission of 214,000 refugees within a three-and-one-half-year period as nonquota immigrants; expired Dec. 31, 1956); Act of Sept. 11, 1957, Pub. L. No. 85-316, 71 Stat. 639 (allowed two more

ney General from deporting an alien to a country in which he or she would be subject to physical persecution.<sup>7</sup> This restraint on deportation formed the foundation of political asylum provisions now found in domestic law. The passage of the Immigration and Nationality Act of 1952,<sup>8</sup> however, established that decisions to withhold deportation when there was fear of such persecution were discretionary with the Attorney General.<sup>9</sup>

In 1967, the United States ratified the Protocol Relating to the Status of Refugees.<sup>10</sup> The Protocol did not create a right of entry for refugees or set forth a procedure for their admission.<sup>11</sup> Rather, it merely created the right of refugees within the United States to avoid expulsion to a country in which their lives or freedom would be threatened because of their political opinions.<sup>12</sup> The Protocol's status has been argued in the courts,<sup>13</sup> but it appears to have the force of law under the

years to carry out admissions begun under the Refugee Relief Act of 1953); Fair Share Law of 1960, Pub. L. No. 86-648, 74 Stat. 504 (authorized Attorney General to "parole" into the United States "alien refugee-escapee(s)"). See generally *Shen v. Esperdy*, 428 F.2d 293 (2d Cir. 1970); 1 GORDON & ROSENFELD, *supra* note 5, § 2.24Aa.

7. Internal Security Act of 1950, ch. 1024, § 23, 64 Stat. 987, 1010 (repealed 1952).

8. Ch. 477, 66 Stat. 163 (current version at 8 U.S.C. §§ 1101-1525 (1976 & Supp. 1980)).

9. *Id.* § 243(h) (current version at 8 U.S.C. § 1253(h) (1976 & Supp. 1980)).

10. 19 U.S.T. 6223, T.I.A.S. No. 6577, 606 U.N.T.S. 268 (in force Oct. 10, 1967). The Protocol incorporated the terms of the 1951 Convention Relating to the Status of Refugees, 19 U.S.T. 6261, T.I.A.S. No. 6577, 189 U.N.T.S. 152, which gave a refugee the right to avoid expulsion to a country in which his or her life or freedom would be threatened on account of race, religion, nationality, membership in a particular social group, or political opinion. *Id.* art. 33. The United States did not sign the Convention.

11. The Universal Declaration of Human Rights, to which the United States is a signatory, creates "the right to seek and enjoy in other countries asylum from persecution." G.A. Res. 217, U.N. Doc. A/810, at 71, art. 14 (1948). The Universal Declaration, however, is not a binding document; it merely sets forth a "common standard of achievement" to which member states should strive. *Id.* Preamble. For a discussion of international instruments concerning refugees, see Nanda, *World Refugee Assistance: The Role of International Law and Instruments*, 9 HOFSTRA L. REV. 449 (1981).

12. This protection is afforded only to those refugees deemed to be within the United States. *Chim Ming v. Marks*, 505 F.2d 1170 (2d Cir.) (per curiam), *cert. denied*, 421 U.S. 911 (1975); *Kan Kam Lin v. Rinaldi*, 361 F. Supp. 177 (D.N.J. 1973), *aff'd sub nom.* *Yu Fung Cheng v. Rinaldi*, 493 F.2d 1229 (2d Cir.), *cert. denied*, 419 U.S. 874 (1974).

13. See, e.g., *Coriolan v. INS*, 559 F.2d 993, 996-97 (5th Cir. 1977); *Pierre v. United States*, 547 F.2d 1281 (5th Cir.), *vacated and remanded*, 434 U.S. 962 (1977); *Sannon v. United States*, 427 F. Supp. 1270 (S.D. Fla. 1977), *vacated and remanded*, 566 F.2d 104 (5th Cir. 1978). See generally Frank, *Effect of the 1967 United Nations Protocol on the Status of Refugees in the United States*, 11 INT'L LAW. 291, 295-99 (1977); Mackler & Weeks, *The Fleeing Political Refugee's Final Hurdle—The Immigration and Nationality Act*, 5 N. KY. L. REV. 9 (1978); Nanda, *World Refugee Assistance: The Role of International Law and Institutions*, 9 HOFSTRA L. REV. 449, 453-57 (1981); Note, *Coriolan v. Immigration and Naturalization Service: A Closer Look at Immigration Law and the Political Refugee*, 6 SYRACUSE J. INT'L L. & COM. 133, 149-53 (1978).

Constitution.<sup>14</sup>

The Refugee Act of 1980<sup>15</sup> incorporated some features of the Protocol<sup>16</sup> and provided a statutory basis for political asylum. The Act also amended section 243(h) of the Immigration and Nationality Act, which provides for procedures for the withholding of deportation.<sup>17</sup> Today, under the Act, an alien may seek political asylum in the United States through both the asylum procedures and the procedures for the withholding of deportation.<sup>18</sup>

### Asylum

The Refugee Act of 1980 defines a refugee as an alien who has a well-founded fear of persecution on account of race, religion, political opinion, nationality, or membership in a particular social group.<sup>19</sup> The

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14. U.S. CONST. art. VI, cl. 2; see *In re Dunar*, 14 I. & N. Dec. 310 (1973); NATIONAL LAWYERS GUILD, IMMIGRATION LAW AND DEFENSE 8-27 (2d ed. 1981) [hereinafter cited as NATIONAL LAWYERS GUILD]. See generally Frank, *Effect of the 1967 United Nations Protocol on the Status of Refugees in the United States*, 11 INT'L LAW. 291 (1977).

15. Pub. L. No. 96-212, 94 Stat. 102 (codified at 8 U.S.C. § 1153(h) (Supp. IV 1980)).

16. See H.R. REP. NO. 781, 96th Cong., 2d Sess. 19-20, reprinted in 1980 U.S. CODE CONG. & AD. NEWS 160, 160-61.

17. Pub. L. No. 96-212, § 202(e), 94 Stat. 102, 107 (codified at 8 U.S.C. § 1153(h) (Supp. IV 1980)).

18. See Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (codified at 8 U.S.C. § 182(d)(5) (Supp. IV 1980)). See generally 1 GORDON & ROSENFELD, *supra* note 5, §§ 2.24Af, 2.3i; 1A *id.* § 5.16. Other methods of entry commonly used by aliens not eligible for political asylum include parole into the United States and conditional entry status. Under the parole power, the Attorney General can parole an alien into the United States temporarily; the alien is not deemed to have "entered" the United States. 8 U.S.C. § 1182(d)(5) (Supp. IV 1980). The parole power was recently amended to limit its use to parole on an individual basis and to eliminate the possibility of group parole. Refugee Act of 1980, Pub. L. No. 96-212, § 203(f), 94 Stat. 102, 107 (codified at 8 U.S.C. § 1182(d)(5) (Supp. IV 1980)).

Conditional entry status was created in 1965 to allow the admission of refugees from communist countries, from the Middle East, or from countries disturbed by a natural calamity. Act of Oct. 3, 1965, Pub. L. No. 89-236, § 3, 79 Stat. 911, 912 (1965) (adding § 203(a)(7) to Immigration and Nationality Act of 1952). The government was criticized for limiting the applicability of this provision to aliens from communist countries and the Middle East because this provision created the only method of asylum for refugees who had not yet entered the United States. See Hanson, *Behind the Paper Curtain: Asylum Policy versus Asylum Practice*, 7 N.Y.U. REV. L. & SOC. CHANGE 107, 127 (1978). Conditional entry status was abolished by the Refugee Act of 1980, Pub. L. No. 96-212, § 203(c), 94 Stat. 102, 107.

19. 8 U.S.C. § 1101(a)(42) (Supp. IV 1980). This section provides in pertinent part: "The term 'refugee' means [any person outside his or her country of nationality or within the country of nationality but in special circumstances specified by the President] . . . who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion."

Act provides for the establishment of an asylum procedure that must be made available to an alien "physically present in the United States or at a land border or port of entry, irrespective of such alien's status."<sup>20</sup> Thus, in contrast to asylum procedures under the Protocol, the statutory asylum procedure is not limited to aliens within the United States and provides a method of admission for aliens outside the United States.<sup>21</sup> An alien may be granted asylum only if he or she is determined to be a refugee under the Act.<sup>22</sup>

Under the procedures promulgated pursuant to the Act,<sup>23</sup> the district director of the Immigration and Naturalization Service (INS) has jurisdiction over asylum requests made at a port of entry before exclusion or deportation proceedings.<sup>24</sup> While the district director has some discretion in deciding to grant or deny an asylum application, the application must be denied in certain situations, such as when the district director finds that the alien is not a refugee.<sup>25</sup> An alien has no appeal from the decision of the district director,<sup>26</sup> but may renew the application in deportation or exclusion proceedings.<sup>27</sup>

### Withholding of Deportation

An alien who is already in exclusion or deportation proceedings before an immigration judge may apply for asylum, or renew his or her

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20. 8 U.S.C. § 1158 (Supp. IV 1980).

21. The definition of "refugees" under the Act includes those aliens still within their country of nationality, in such special circumstances as the President may specify. *Id.* § 1101(a)(42)(B). Thus, "refugees" can include certain persons who have a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion, but who have not yet left their home countries. The Act gives the President the authority to admit 50,000 refugees per year through fiscal year 1982, and thereafter to admit as many, after consultation, as are justified by humanitarian concerns or otherwise in the public interest. Refugee Act of 1980, § 201(b), 8 U.S.C. § 1157 (Supp. IV 1980). In addition, the President may authorize the admission of additional numbers of refugees in "an unforeseen emergency refugee situation." *Id.*

22. 8 U.S.C. § 1158(a) (Supp. IV 1980).

23. 8 C.F.R. § 208 (1980).

24. *Id.* § 208.1. The alien must apply for asylum and has the burden of establishing that he or she is unable or unwilling to return to the country of his or her nationality. *Id.* §§ 208.2, 208.5. In reaching a decision to grant or deny asylum, the district director must request an advisory opinion from the Bureau of Human Rights and Humanitarian Affairs, which is part of the State Department. *Id.* § 208.7.

25. *Id.* § 208.8.

26. *Id.* § 208.8(c).

27. *Id.* § 208.9. It has been suggested that it is possible to have *de facto* asylum when the district director denies an alien's asylum request and, under 8 C.F.R. § 208.8(f)(iv), grants a voluntary departure on an extended basis. NATIONAL LAWYERS GUILD, *supra* note 14, at 8-34. A grant of asylum extends for one year; after one year, the alien's status is reviewed and the asylum extended or terminated, or the alien may be eligible for an adjustment of status to that of permanent resident. 8 C.F.R. § 208.8(e) (1980).

asylum request if it has been denied by a district director.<sup>28</sup> The request will then be considered an application for withholding of deportation under section 243(h) of the Immigration and Nationality Act.<sup>29</sup>

Section 243(h) originally created a dual level of review. The Attorney General determined first whether the alien would be subject to persecution and then whether to exercise his discretion in granting relief. The original standard under section 243(h) was that of "physical persecution."<sup>30</sup> The "physical persecution" standard was interpreted narrowly. One court stated, "Physical persecution involves a grave challenge to those personal rights . . . fundamental to our constitutional scheme . . . ."<sup>31</sup> The courts considered physical persecution to involve only such serious threats as those of confinement, torture or death,<sup>32</sup> or "economic sanctions so severe as to deprive a person of all means of earning a livelihood."<sup>33</sup> The requirement of physical persecution, however, was criticized as too narrow<sup>34</sup> on the grounds that the standard placed an onerous burden on the alien<sup>35</sup> and did not contemplate methods of persecution apart from bodily violence.<sup>36</sup> Section 243(h) therefore was amended in 1965.<sup>37</sup>

The 1965 amendment altered the standard to require the alien to show that he or she "would be subject to persecution on account of race, religion or political opinion."<sup>38</sup> The emphasis was thus shifted from the result of the persecution—physical harm—to the motivation for the persecution—race, religion, or political opinion.<sup>39</sup> This change

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28. *Id.* §§ 208.1, 208.8, 208.9.

29. 8 U.S.C. § 1253(h) (Supp. IV 1980); *see* 8 C.F.R. § 208.3(b) (1980).

30. Immigration and Nationality Act of 1952, ch. 477, § 243(h), 66 Stat. 163, 214; *see* *Sovich v. Esperdy*, 319 F.2d 21, 32 (2d Cir. 1963) (Moore, J., dissenting).

There was little legislative history on the purpose of § 243(h). *See* *Szlajmer v. Esperdy*, 188 F. Supp. 491, 499 & n.5 (S.D.N.Y. 1960). As the court in *Szlajmer* noted, there was "a legislative dread that deportation for some aliens might well amount to a death sentence. To accord a hearing in such circumstances is not alone to advance the cause of the alien, but our own ideals of democratic justice as well. To deny one is to rob this remedial legislation of its vitality and, worse, to transform it into an instrument of oppression." *Id.* at 499.

31. *Chi Sheng Liu v. Wolton*, 297 F.2d 740, 741 (9th Cir. 1961).

32. *Blazina v. Bouchard*, 286 F.2d 507, 511 (3d Cir.), *cert. denied*, 366 U.S. 950 (1961).

33. *Soric v. Flagg*, 303 F.2d 289, 290 (7th Cir. 1962); *see also* *Dunat v. Hurney*, 297 F.2d 744, 753 (3d Cir. 1962); *Diminich v. Esperdy*, 299 F.2d 244 (2d Cir.), *cert. denied*, 369 U.S. 844 (1961).

34. *See, e.g., Hearings on S. 500 Before the Subcomm. on Immigration and Naturalization of the Senate Judiciary Comm.*, 89th Cong., 1st Sess., 535, 887 (1965); *Hearings on H.R. 2580 Before Subcomm. No. 1 of the House Judiciary Comm.*, 89th Cong., 1st Sess., 213, 217 (1965); *Hearings on H.R. 7700 Before Subcomm. No. 1 of the House Judiciary Comm.*, 88th Cong., 2d Sess., 860-61 (1964).

35. *See* *Kovac v. INS*, 407 F.2d 102, 106 (9th Cir. 1969).

36. *See id.* at 106 n.9.

37. Act of Oct. 3, 1965, § 11(f), Pub. L. No. 89-236, 79 Stat. 911, 918.

38. 8 U.S.C. § 1153(h) (1976).

39. *See* *Kovac v. INS*, 407 F.2d at 107. Although some courts phrased the 1952 stan-

was intended to broaden the applicability of section 243(h) and to lighten the burden imposed on the alien by removing the requirement that the alien demonstrate threatened bodily harm.<sup>40</sup>

Section 243(h) was amended by the Refugee Act of 1980<sup>41</sup> to state in part: "The Attorney General shall not deport or return any alien . . . to a country if the Attorney General determines that such alien's life or freedom would be threatened in such country on account of race, religion, nationality, membership in a particular social group, or political opinion."<sup>42</sup>

The amendment made several important changes. First, the Attorney General—or his or her delegate, the immigration judge<sup>43</sup>—no longer has the discretion to decide whether to deport the alien. Once it is determined that the alien is entitled to relief under section 243(h), the statute mandates that the Attorney General grant relief.<sup>44</sup> Second, relief under section 243(h) is no longer limited to aliens "within the United States."<sup>45</sup> Third, an alien has two bases on which to show a

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dard as physical persecution motivated by race, religion, or political opinion, *see, e.g.,* *Blazina v. Bouchard*, 286 F.2d 507, 511 (3d Cir.), *cert. denied*, 366 U.S. 950 (1961), the statute was not so phrased.

40. *See* *Kovac v. INS*, 407 F.2d at 106.

41. Pub. L. No. 96-212, 94 Stat. 102. The purpose of the Act was to establish a comprehensive refugee resettlement and assistance policy and to give "statutory meaning to our national commitment to human rights and humanitarian concerns." S. REP. NO. 96-256; 96th Cong., 2d Sess. 1, *reprinted in* 1980 U.S. CODE CONG. & AD. NEWS 141.

42. Refugee Act of 1980, Pub. L. No. 96-212, § 202(e), 94 Stat. 102, 107 (codified at 8 U.S.C. § 1253(h) (Supp. IV 1980)).

43. *See* 8 U.S.C. § 1103(a) (1976).

44. "The Attorney General *shall not* deport an alien . . ." Refugee Act of 1980, Pub. L. No. 96-212, § 202(e), 94 Stat. 102, 107 (codified at 8 U.S.C. § 1253(h) (Supp. IV 1980)) (emphasis added).

45. Prior to 1980, an alien who was not deemed to be "within" the United States did not have access to § 243(h) relief from deportation. *Leng May Ma v. Barber*, 357 U.S. 185 (1958); *see* Frank, *Effect of the 1967 United Nations Protocol on the Status of Refugees in the United States*, 11 INT'L LAW. 291, 293 (1977); Mackler & Weeks, *The Fleeing Political Refugee's Final Hurdle—The Immigration and Nationality Act*, 5 N. KY. L. REV. 7, 11 (1978). This resulted from the language of § 243(h): "The Attorney General is authorized to withhold the deportation of any alien *within* the United States . . ." Ch. 477, § 243(h), 66 Stat. 163, 214 (emphasis added). Since the 1980 amendment, § 243(h) relief is available to aliens who are not "within" the United States. *See* 8 U.S.C. § 1253(h) (Supp. IV 1980); 8 C.F.R. § 208.11; 1A GORDON & ROSENFELD, *supra* note 5, § 5.16(b), at 5-181.

Under the pre-1980 standard, an alien who was subject to exclusion was not deemed to be within the United States under § 243(h), and thus could not present his or her asylum claim at a later exclusion hearing. *See* *Pierre v. United States*, 547 F.2d 1281 (5th Cir. 1977); Frank, *supra*; Mackler & Weeks, *supra*; Comment, *Due Process Rights for Excludable Aliens under United States Immigration Law and the United Nations Protocol Relating to the Statute of Refugees—Haitian Aliens, a Case in Point*, 10 N.Y.U.J. INT'L L. & POL. 203 (1977). *But see* *Sannon v. United States*, 427 F. Supp. 127 (S.D. Fla. 1977), *vacated and remanded*, 566 F.2d 104 (5th Cir. 1978) (immigration judge has authority under the Protocol to hear an



threat to life or freedom in addition to race, religion, and political opinion: nationality and membership in a particular social group.

Confusion may be caused by the different standards to be used in asylum and withholding of deportation procedures. An alien is both a "refugee" and eligible for the asylum procedure if he or she has a "well-founded fear of [political] persecution."<sup>46</sup> An alien in a deportation proceeding, however, currently must show under section 243(h) that his or her "life or freedom would be threatened" because of race, religion, nationality, membership in a particular social group, or political opinion, in order to avoid deportation to a particular country.<sup>47</sup>

Prior to 1980, the section 243(h) standard was "would be subject to persecution."<sup>48</sup> Under this standard, courts have required that an alien demonstrate a likelihood of persecution,<sup>49</sup> a clear probability of persecution,<sup>50</sup> or actual persecution shown by a preponderance of the evidence.<sup>51</sup> In some cases, an alien was required to demonstrate only a well-founded fear of persecution to obtain section 243(h) relief.<sup>52</sup> These decisions apparently derived this standard from the Protocol, which defined a refugee as a person with a "well-founded fear of being persecuted."<sup>53</sup>

In *Kashani v. INS*,<sup>54</sup> the court stated that the "well-founded fear" standard of the Protocol and the "would be subject to persecution" standard of section 243(h) were actually quite similar:

[The language of the Protocol] surely refers to more than the alien's subjective state of mind. We hold that an alien claiming a "well founded fear of persecution" must either demonstrate that he actually has been a victim of persecution or that his fear is more than a matter of his own conjecture. . . .

This requirement can only be satisfied by objective evidence that

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alien's asylum claim in exclusion hearings; opinion vacated and remanded on question of mootness in light of new regulations promulgated by the INS).

Excludable aliens are those who have been found excludable under 8 U.S.C. § 1182 (1976 & Supp. IV 1980). An excludable alien now may present his or her asylum claim at the exclusionary hearing. This hearing, however, does not provide the alien with protection as great as that provided in the deportation hearing, because the alien is not entitled to the procedural safeguards granted to the deportable alien. NATIONAL LAWYERS GUILD, *supra* note 14, at § 5.4(c).

46. 8 U.S.C. § 1101(a)(42) (Supp. IV 1980); *see id.* § 1158(a).

47. *Id.* § 1253(h).

48. *See* note 37 & accompanying text *supra*.

49. *McMullen v. INS*, 658 F.2d 1312 (9th Cir. 1981); *In re Joseph*, 13 I. & N. Dec. 70 (1968).

50. *Lena v. INS*, 379 F.2d 536, 538 (7th Cir. 1967).

51. *Paul v. INS*, 521 F.2d 194 (5th Cir. 1975).

52. *See, e.g., Pereira-Diaz v. INS*, 551 F.2d 1149, 1154 (9th Cir. 1977); *In re François*, 15 I. & N. Dec. 534, 539 (1975); *see also In re Dunar*, 14 I. & N. Dec. 310 (1973).

53. *See* note 10 *supra*. *See In re Dunar*, 14 I. & N. Dec. 310 (1973).

54. 547 F.2d 376 (7th Cir. 1977).

the alien's assertions are correct. Thus, the "well founded fear" standard contained in the Protocol and the "clear probability" standard which this court has engrafted onto section 243(h) will in practice converge.<sup>55</sup>

The language of the Protocol thus underlies the "well-founded fear" standard of asylum procedure.<sup>56</sup>

The courts and the INS, however, have applied the "well-founded fear" standard of asylum in the same manner as they have applied the "would be subject to persecution" standard under the pre-1980 version of section 243(h).<sup>57</sup> Therefore, the courts and the INS may interpret the new statutory "well-founded fear" standard of asylum in the same manner as they have interpreted the "would be subject to persecution" standard under the pre-1980 version of section 243(h). The courts and the INS thus would have some guidance for their interpretation of the new statutory asylum provision.

Congress also changed the language of section 243(h).<sup>58</sup> The new "life or freedom would be threatened" standard of section 243(h) would seem to be more difficult to satisfy than the "would be subject to persecution" standard, because a specific kind of harm must be demonstrated, rather than merely some kind of persecution.<sup>59</sup> The Ninth Circuit, however, in a case decided under new section 243(h), has interpreted these two standards as being equivalent.<sup>60</sup> Thus, it seems that this distinction in terminology will not affect a court's determination of section 243(h) requests.

Although old section 243(h), new section 243(h), and the statutory definition of "refugee" used in the asylum procedure all use different language to describe the showing an alien must make to be granted asylum, in practice the courts and the INS may interpret them to be the same standard. The INS regulations governing requests for asylum provide that an asylum applicant must show a "well-founded fear of persecution."<sup>61</sup> This standard seems to apply both to the asylum procedure<sup>62</sup> and to the procedure for seeking a section 243(h) withholding of

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55. *Id.* at 379.

56. See notes 15-16, 19 & accompanying text *supra*.

57. See note 37 & accompanying text and text accompanying note 48 *supra*.

58. See notes 41-42 & accompanying text *supra*.

59. This standard could thus be interpreted as a return to the pre-1965 emphasis on the kind of persecution rather than on the motivation for the persecution. See notes 31-40 & accompanying text *supra*.

60. *McMullen v. INS*, 658 F.2d 1312, 1315 (9th Cir. 1981): "The elements necessary to withholding of deportation of [the petitioner include]: 1. A likelihood of persecution; *i.e.*, a threat to life or freedom."

61. 8 C.F.R. § 208.5 (1980).

62. *Id.* § 208.8.

deportation.<sup>63</sup>

### Deportation Procedure and Judicial Review

In a deportation hearing in which an alien presents a section 243(h) request, the alien has the burden of proving a well-founded fear of persecution if returned to the home country.<sup>64</sup> In contrast to the asylum hearing before the district director, the alien in a deportation hearing may present oral testimony in addition to documentary evidence, and the INS also may present evidence.<sup>65</sup> If the immigration judge denies the section 243(h) request, deportation proceedings will be continued.<sup>66</sup>

Although an alien cannot appeal the district director's denial of asylum,<sup>67</sup> an alien can appeal the immigration judge's denial of section 243(h) relief. The first appeal is to the Board of Immigration Appeals.<sup>68</sup> The Board may make a de novo review of the record, but cannot consider new evidence.<sup>69</sup> In addition, the Board may make an independent evaluation of questions of law and fact and of discretionary decisions.<sup>70</sup> Thus, the immigration judge's decision is subject to broad review by the Board.

Following an unsuccessful appeal to the Board, an alien may petition for review of a final deportation order<sup>71</sup> in one of the circuit courts of appeals.<sup>72</sup> An alien also may seek relief in a federal district court in some circumstances.<sup>73</sup> The scope of judicial review, however, is more limited than the scope of the Board's review.<sup>74</sup> The courts traditionally

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63. *Id.* §§ 208.9-.10. This Comment therefore assumes that the "well-founded fear" standard applies to both procedures.

64. *See* McMullen v. INS, 658 F.2d 1312, 1317 (9th Cir. 1981).

65. 8 C.F.R. § 208.10(c) (1980).

66. When the asylum request is filed, the hearing is adjourned to obtain an advisory opinion from the Bureau of Human Rights and Humanitarian Affairs. *Id.* § 208.10(b). Only upon denial of asylum are the exclusion or deportation proceedings reinstated. *Id.* § 208.10(f).

67. *Id.* § 208.8(c). *See* notes 26-27 & accompanying text *supra*.

68. The appellate jurisdiction of the Board is described in 8 C.F.R. § 3.1(b) (1980).

69. *See* NATIONAL LAWYERS GUILD, *supra* note 14, at § 9.2(d).

70. *Id.*

71. A final order of deportation includes all determinations incident to the deportation hearing, including denial of withholding of deportation. *See* Foti v. INS, 375 U.S. 217, 232 (1963).

72. 8 U.S.C. § 1105a (1976).

73. An alien held in custody pursuant to a deportation order may seek review through a writ of habeas corpus. 8 U.S.C. § 1105a(a)(9) (1976); *see also id.* §§ 1105(b), 1252(c). An alien may also seek injunctive relief, *see* Blazina v. Bouchard, 286 F.2d 507 (3d Cir.), *cert. denied*, 366 U.S. 950 (1961), or declaratory relief. *See* Haitian Refugee Center v. Civiletti, 503 F. Supp. at 532-33.

74. *See generally* Note, *Judicial Review of Administrative Stays of Deportation: Section 243(h) of the Immigration and Nationality Act of 1952*, 1976 WASH. U.L.Q. 59.

have focused on whether the INS acted in conformity with the law and the Constitution.<sup>75</sup> In addition, the court's review generally is confined to the administrative record; except in unusual circumstances, a court cannot conduct a *de novo* review of matters that were or should have been considered by the INS.<sup>76</sup>

When an alien challenges an order of deportation, the reviewing court examines the agency's interpretation of the statutory requirements. If the agency misinterpreted the statute, the court will nullify the agency's action.<sup>77</sup> In addition, the court will review the procedures followed by the agency to ensure that the alien was accorded procedural due process in his or her hearing.<sup>78</sup>

Before 1980, the Attorney General and the immigration judge had discretion to determine whether to grant section 243(h) relief.<sup>79</sup> The courts generally gave extreme deference to the decision, and would not overturn it absent a clear showing of abuse or of a failure to exercise discretion.<sup>80</sup> As the Attorney General's discretion was removed in 1980,<sup>81</sup> however, the appropriate standard for review is no longer the "abuse-of-discretion" standard; instead, a reviewing court will apply a "substantial evidence" standard.<sup>82</sup> Under the new standard, a court has more power to review the determination of the immigration judge, but the scope of review is necessarily "limited to a review of the record to determine whether the agency's determination is substantially supported."<sup>83</sup>

The administrative decision regarding an alien's asylum request heavily influences a court's decision on review. Only with an understanding of the narrowness of judicial review can the decisions in cases reviewing denials of political asylum requests be understood.

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75. See, e.g., *Tejeda v. INS*, 346 F.2d 389, 392 (9th Cir. 1965). "The formulas for review developed in large measure out of the due process requirements of the Fifth Amendment . . ." 2 GORDON & ROSENFELD, *supra* note 5, § 8.11a, at 8-96.

76. 8 U.S.C. § 1105a(a)(4) (1976). A situation in which an alien charges that actions not reflected in the record are unfair is an exception to this rule. See *Shaughnessy v. Accardi*, 349 U.S. 280 (1955).

77. See, e.g., *Rosenberg v. Fleuti*, 374 U.S. 449 (1963).

78. *The Japanese Immigrant Case*, 189 U.S. 86, 100 (1903); see *Attoh v. INS*, 606 F.2d 1273 (D.C. Cir. 1979).

79. See Immigration and Nationality Act of 1952, ch. 477, § 243(h), 66 Stat. 163, 212.

80. See, e.g., *Foti v. INS*, 375 U.S. 217 (1963).

81. 8 U.S.C. § 1253(h) (Supp. IV 1980). See text accompanying notes 42-44 *supra*. Section 243(h) relief now must be granted if the alien meets the statutory standard. Although discretion is involved in the determination whether an alien meets the standard, the final decision to grant or deny the section 243(h) request is not discretionary.

82. *McMullen v. INS*, 658 F.2d 1312, 1316-17 (9th Cir. 1981).

83. *Id.* at 1317.

## Political Asylum Claims of Haitian Refugees

To demonstrate a well-founded fear of persecution because of political opinion,<sup>84</sup> an alien must show, first, a well-founded fear that the government of the home country actually would punish or suppress the alien upon his or her return, and second, that the persecution would result from a prior expression of political opinion.<sup>85</sup> Denials of claims for asylum of some citizens of a particular country do not affect later claims of other citizens from the same country because each claim must be determined based on its own facts.<sup>86</sup> Each individual determination must be made in light of conditions in that alien's home country.<sup>87</sup>

Problems faced by Haitian refugees in the United States are attributable in part to the numbers in which they have sought refuge here. Immigration officials estimate that more than 17,000 Haitians are currently in the United States,<sup>88</sup> and it is believed that, of this number, more than 15,000 have entered since 1972.<sup>89</sup> This massive influx of Haitians into the United States has caused great difficulties for the federal government.<sup>90</sup> President Reagan's decision that the United States will patrol the water near Haiti to intercept Haitians attempting to flee to the United States<sup>91</sup> indicates the increasing gravity of the Haitian

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84. Immigration and Nationality Act of 1952, 8 U.S.C. § 1101(a)(42) (1976 & Supp. IV 1980). See note 19 & accompanying text *supra*.

85. See *Fleurinor v. INS*, 585 F.2d 129, 131-34 (5th Cir. 1978); *In re Joseph*, 13 I. & N. Dec. 70, 72-73 (1968); see also *Shkukani v. INS*, 435 U.S. 920 (1971); *In re Williams*, 16 I. & N. Dec. 697 (1979); *In re Surzycki*, 13 I. & N. Dec. 261 (1969).

86. See, e.g., *Kovac v. INS*, 407 F.2d 102, 105 (9th Cir. 1969); *In re Janus & Janek*, 12 I. & N. Dec. 866, 876 (1968); see also *Santos v. INS*, 375 F.2d 262, 264 (9th Cir. 1967).

87. See *Haitian Refugee Center v. Civiletti*, 503 F. Supp. at 475; see also *Coriolan v. INS*, 559 F.2d 993, 1002 (5th Cir. 1977). In *Fleurinor v. INS*, 585 F.2d 129 (5th Cir. 1978), the petitioner requested the court to vacate the decision of the Board of Immigration Appeals denying his § 243(h) request in order to introduce the latest Amnesty International report on political conditions in Haiti. The court declined to do so, stating that the report was not material to *this* petitioner's claim. *Id.* at 132-33 (applying 28 U.S.C. § 2347(c) (1976)). The court thereby confused materiality to the particular facts underlying this individual's petition and materiality to general background underlying the petition. While the report may not have been relevant to the individual's particular allegations, it may have been relevant as general background material; some courts have admitted the report on this basis. See *In re Williams*, 16 I. & N. Dec. 697, 701 (1979); see also *Coriolan v. INS*, 559 F.2d 993, 1002-03 (5th Cir. 1977).

88. N.Y. Times, May 14, 1980, at 1, col. 4.

89. N.Y. Times, Apr. 16, 1980, at 16, col. 2.

90. In December 1978, there were more than 8800 exclusion and deportation cases involving Haitians pending before the INS in southern Florida. See Lawyers Committee for International Human Rights, *The Haitians in Miami: Current Immigration Practices in the United States* 1 (Dec. 1978). To resolve this problem, the INS accelerated the exclusion and deportation proceedings, but was stopped in this effort by the court in *Haitian Refugee Center v. Civiletti*, 503 F. Supp. 442 (S.D. Fla. 1980), which held that the accelerated proceedings violated the petitioners' due process rights.

91. Exec. Order No. 12,324, 46 Fed. Reg. 48,109 (1981). It has been alleged that the

refugee problem. A proper and just analysis of Haitian asylum claims therefore is essential.

### Haitian Refugee Center v. Civiletti

In *Haitian Refugee Center v. Civiletti*,<sup>92</sup> more than 4,000 Haitians seeking political asylum in the United States brought a class action suit against officials of the federal government and of the INS to obtain relief for alleged violations of their substantive and procedural asylum rights. The individual plaintiffs in *Haitian Refugee Center* were involved in asylum proceedings under the Protocol and INS regulations and in deportation proceedings in which they sought to present section 243(h) requests.

Under the "Haitian Program," the number of asylum hearings of Haitians was accelerated from a few per day to more than sixty per day.<sup>93</sup> The plaintiffs alleged that the INS had established the program because of the great number of Haitians in asylum and deportation proceedings.<sup>94</sup> In the expedited proceedings, Haitian claims were prejudged as lacking any merit; the proceedings had the sole purpose of expelling Haitians from the United States.<sup>95</sup> Under the Haitian Program, all of the claims for asylum were denied.<sup>96</sup> Finding that the Haitian Program violated the Haitians' rights to equal protection and due process of law, Judge King enjoined the government from expelling or deporting, and from continuing proceedings to expel or deport, the

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difficulties that the Haitians have faced in obtaining asylum in the United States are due to racial bias. See N.Y. Times, May 8, 1980, at 13, col. 1; N.Y. Times, Sept. 24, 1980, at 27, col. 6. Most Haitians are black. T. WEIL, AREA HANDBOOK FOR HAITI vii (1973). Haitians are the first substantial group of black refugees to seek asylum in the United States. See *Haitian Refugee Center v. Civiletti*, 503 F. Supp. at 451.

In addition to racial bias, it has been suggested that Haitians face discrimination because they come from a country that has friendly relations with the United States. Because the governments are friendly, the United States may hesitate to grant political asylum to a Haitian, for the Haitian government might consider this an unfriendly act. Thus, political considerations may enter into the determination of asylum for Haitians. See generally Hanson, *Behind the Paper Curtain: Asylum Policy versus Asylum Practice*, 7 N.Y.U. REV. L. & SOC. CHANGE 107 (1978).

92. 503 F. Supp. 442 (S.D. Fla. 1980).

93. *Id.* at 523.

94. *Id.* at 510. The plaintiffs stated 16 causes of action. As summarized by the court, causes of action 1-14 challenged various procedural aspects of the expedited proceedings, cause of action 15 alleged that the program constituted discrimination because of national origin, and cause of action 16 alleged that the effect of the program was to deprive the plaintiffs of fundamental fairness in processing their asylum claims. *Id.* at 457.

95. *Id.* at 512-13. The expedited proceedings included the refusal to suspend deportation proceedings upon the making of an asylum claim, the intimidation and penalizing of those who sought to exercise their right to remain silent, and mass scheduling of asylum hearings. *Id.* at 519-26.

96. *Id.* at 510-11.

plaintiffs until the court could review a detailed plan to be submitted by the government for the orderly and nondiscriminatory processing of the plaintiffs' asylum and section 243(h) requests.<sup>97</sup>

Although the procedural question of the permissibility of the Haitian Program formed the framework of Judge King's opinion, Judge King also extensively discussed conditions in Haiti.<sup>98</sup> Basing his discussion on the proposition that "[n]o asylum claim can be examined without an understanding of the conditions in the applicant's homeland,"<sup>99</sup> Judge King, after hearing hours of testimony and examining reports by such groups as the State Department and Amnesty International, examined the conditions in Haiti underlying the plaintiffs' asylum claims.<sup>100</sup> As the likelihood of persecution that an alien faces depends on the activities of the alien's home government, a Haitian's claim for political asylum should be evaluated in light of conditions and government practices in Haiti.

### Haiti

Located in the Caribbean, the Haitian Republic occupies the western third of the island of Hispaniola.<sup>101</sup> With a population of more than 4.2 million people, Haiti is one of the most densely populated countries in the world.<sup>102</sup> It is also one of the poorest; in 1977, the per capita income was \$232, the lowest in the western hemisphere.<sup>103</sup> Its literacy rate is less than twenty percent.<sup>104</sup>

The Duvalier family has ruled Haiti since 1957, when François Duvalier was elected President.<sup>105</sup> During the first years of his rule, Duvalier systematically eliminated potential centers of opposition.

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97. *Id.* at 532.

98. *Id.* at 474. Judge King examined persecution on return to Haiti, *id.* at 476-82, Haitian prisons, *id.* at 493-97, Haitian security forces, *id.* at 497-500, the Haitian legal system, *id.* at 500-03, Haitian politics, *id.* at 503-06, Haitian society, *id.* at 506-07, and Haitian economics, *id.* at 507-10.

99. *Id.* at 475. This proposition has been advanced in other cases. *See, e.g.,* Coriolan v. INS, 559 F.2d 993, 1002 (5th Cir. 1977); Sovich v. Esperdy, 319 F.2d 21, 34 (2d Cir. 1963) (Moore, J., dissenting).

100. 503 F. Supp. at 475-93. On appeal, the Fifth Circuit emphasized that the evidence concerning conditions in Haiti was relevant only to show the scope of evidence available to plaintiffs in their individual asylum claims, and thus to corroborate their contention that the accelerated program violated their rights of due process. "However relevant the conditions in Haiti might be to a review on the merits of a denial of asylum, that issue was not before the district court." Haitian Refugee Center v. Smith, 676 F.2d 1023, 1042 (5th Cir. 1982).

101. For a general discussion of Haitian society, politics, economics, and national security, see T. WEIL, AREA HANDBOOK FOR HAITI (1973).

102. *Id.* at vii.

103. Lawyers Committee for International Human Rights, Violations of Human Rights in Haiti 33 (June 1980) [hereinafter cited as Lawyers Committee].

104. T. WEIL, AREA HANDBOOK FOR HAITI 93 (1973).

105. R. ROTBERG, HAITI, THE POLITICS OF SQUALOR 196 (1971).

Through the civilian militia, the Tontons Macoutes, politicians were exiled and their followers harassed, the power of the army was dismantled, powerful unions were dissolved, and the clergy and the business community were sapped of their power.<sup>106</sup> Duvalier sought to create a strong black middle class out of a culture in which the leaders were mulatto or of European descent. The terror that he used to weaken his opposition was directed at both the peasant class and the ruling elite.<sup>107</sup> By dismantling the opposition, Duvalier was able to obtain control; through the paramilitary forces, he was able to maintain this power.<sup>108</sup> As one commentator stated, "These forces both exercise the law and are above the law."<sup>109</sup>

In 1971, Jean-Claude Duvalier, the nineteen-year-old son of François Duvalier, was named president-for-life of Haiti by his father.<sup>110</sup> Although violations of human rights were well documented under the rule of François Duvalier,<sup>111</sup> Jean-Claude Duvalier declared his intention to reverse past practices.<sup>112</sup> He has, however, reportedly continued to violate human rights.<sup>113</sup>

Although Haiti has a constitution that safeguards individual rights, these safeguards are suspended when the legislature is not in session, or for about seven months during the year.<sup>114</sup> The paramilitary forces continue to control the countryside and to determine for themselves whether an individual has committed a crime.<sup>115</sup> Political pris-

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106. See D. NICHOLLS, FROM DESSALINES TO DUVALIER 215-21 (1979).

107. *Id.* at 214.

108. See R. ROTBERG, HAITI, THE POLITICS OF SQUALOR 225-33 (1971). "This organization has only one soul: Duvalier; recognizes only one chief: Duvalier; fights for only one destiny: Duvalier in power." F. DUVALIER, MEMOIRS D'UN LEADER DU TIERS MONDE 324 (1969), reprinted in Lawyers Committee, *supra* note 103, at 8.

109. Lawyers Committee, *supra* note 103, at 8; see also R. ROTBERG, HAITI, THE POLITICS OF SQUALOR 353-54 (1971).

110. D. NICHOLLS, FROM DESSALINES TO DUVALIER 239 (1979).

111. Lawyers Committee, *supra* note 103, at 3. The International Commission of Jurists described his rule in stark terms: "In the world today there are many authoritarian regimes. Many have at least the merit of being based on an ideology, but the tyranny that oppresses Haiti has not even this saving grace. A few men have come to power by force and stayed in power by terror. They seem to have only one aim, to bleed for their own gain one of the most wretched countries in the world." *Id.* (quoting BULLETIN OF THE INTERNATIONAL COMMISSION OF JURISTS, No. 17 (1963)).

112. *Id.* at 4.

113. See Amnesty International, Press Release on Haiti (Dec. 6, 1979) [hereinafter cited as Amnesty International]; N.Y. Times, Mar. 7, 1981, at 23, col. 1; N.Y. Times, Dec. 6, 1980, at 22, col. 1.

114. See Amnesty International, *supra* note 113; Lawyers Committee, *supra* note 103, at 4-6.

115. Amnesty International, *supra* note 113; Lawyers Committee, *supra* note 103, at 7-11. "The Macoutes exist to repress the people and to check on those people who say bad things about the government. They have free reign to do whatever they want." Affidavit of Jean Stenio Louis (Miami, July 1979), reprinted in Lawyers Committee, *supra* note 103, at 8.



oners, a group that includes those who offend the government, are subject to torture, beatings, and death.<sup>116</sup> Moreover, severe restrictions are placed on the freedom to participate in the political process<sup>117</sup> and on freedoms of speech, press, and assembly.<sup>118</sup> Thus, Haitians are subject to many violations of their human rights.<sup>119</sup>

In *Haitian Refugee Center*, Judge King first discussed the persecution faced by Haitians upon return to Haiti from a foreign country. He concluded: "The treatment of returnees in Haiti is part of a systematic and pervasive oppression of political opposition . . . ."<sup>120</sup> Under this pattern of persecution,<sup>121</sup> returnees either are imprisoned and abused<sup>122</sup> or are "greeted with great suspicion" and "undergo harassment."<sup>123</sup> Such persecution by the Haitian government may be triggered by either of two forms of action taken by the returnee:<sup>124</sup> illegal departure from Haiti<sup>125</sup> or a claim of asylum while abroad.<sup>126</sup>

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"If a Macoute does something wrong like killing someone, some reprimand may be announced, but even if it is nothing ever happens to the Macoute. He is never punished." Affidavit of Patrick Lemoine (New York, Nov. 1979), *reprinted in id.*

116. Lawyers Committee, *supra* note 103, at 11-17a. "Someone who has a personal confrontation with a member of the Security Forces, or who flees the country and later returns, may easily be swept up in the cruel and violent dragnet of the Security Forces." *Id.* at 12. Moreover, the prisoners are subject to severe psychological and physical abuse while imprisoned. *Id.* at 12-14.

117. *Id.* at 17a-24. Although free elections were called, one candidate who sought to run against a Duvalier supporter was forced to withdraw from the race by the government and subsequently was arrested. *Id.* at 18.

118. *Id.* at 24-32; see Amnesty International, *supra* note 113; N.Y. Times, Dec. 15, 1980, at 10, col. 3. For example, at a meeting on human rights held in Haiti in 1979, government security forces attacked the speaker and beat those in attendance, including representatives from the United States, French, Canadian, and West German Embassies. Lawyers Committee, *supra* note 103, at 29-32.

119. Human rights have been defined as "basic rights intrinsic in man by virtue of his humanity and his worth as a person." Montes, *The Refugees: A Global Movement in Humanism*, 25 CATH. LAW. 187, 189 (1980). Then Secretary of State Cyrus Vance defined human rights: "First there is the right to be free from Governmental violation of the integrity of the person. These include torture, cruel treatment, and punishment. Secondly, the right to food, shelter, health care and education. While the fulfillment of this right is dependent on the country's stage of development, this may be violated [by] Government inaction and indifference to the plight of the poor. Third, the right to enjoy civil and political liberties—Freedom of Thought; of Religion; of Assembly; Freedom of Speech; Freedom of Press; Freedom of Movement both within or outside of one's own country; Freedom to take part in Government." *Id.*

120. 503 F. Supp. at 475.

121. *Id.* at 477, 482; see also Lawyers Committee, *supra* note 103, at 38-41.

122. See 503 F. Supp. at 478-79; see also *Henry v. INS*, 552 F.2d 130, 131 (5th Cir. 1977); *Paul v. INS*, 521 F.2d 194, 203 (5th Cir. 1975) (Godbold, J., dissenting).

123. 503 F. Supp. at 482.

124. See *id.* at 480. Political action taken prior to departure from Haiti, the traditional basis for political asylum, is also a basis of political asylum for Haitians. See notes 146-63 & accompanying text *infra*.

125. 503 F. Supp. at 478.

Judge King also suggested that, even if an individual alien returning to Haiti is not imprisoned or harassed, some government actions that appear economic may have sufficient characteristics of political persecution to provide the foundation for political asylum. The severe poverty in Haiti, he observed, is largely attributable to sociological and political problems.<sup>127</sup> "It is safe to generalize that Haiti's economy has been neglected while the Duvaliers concentrated their primary energies on maintaining power."<sup>128</sup> Judge King, however, would limit the conclusions to be drawn from the premise that economics are a function of politics. Not all poor Haitians are entitled to political asylum; only Haitians who have been subject to government actions that "take on a political color" may be entitled to asylum.<sup>129</sup>

Thus, *Haitian Refugee Center* suggests two distinct bases on which to find the requisite well-founded fear of political persecution.<sup>130</sup> A Haitian's political asylum request may be based on possible mistreatment he or she faces on return for actions taken upon or after leaving Haiti and on conditions in Haiti that caused the Haitian to depart. These conditions may include government actions that seem economic but are political, because they are mechanisms by which Duvalier maintains his power.

Although limited in its holding, *Haitian Refugee Center* provides a foundation upon which a Haitian may build a claim for political asylum. The analysis suggested in dicta by Judge King is an expansion of the doctrine of political asylum. If adopted by other courts and by the INS, the expansive language of Judge King's opinion may provide many Haitians with political asylum who previously were unable to obtain it.

## Elements of Political Asylum

### Political Persecution

One requirement of political asylum is that the alien demonstrate a well-founded fear of persecution if returned to the home country.<sup>131</sup> The persecution must result from the alien's political beliefs and must be inflicted by the government or by a group that the government can-

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126. *Id.* at 477, 480-82.

127. *Id.* at 508. Judge King cited a report by the Congressional Research Service, which identified five sociopolitical causes of Haitian poverty that are a result of Duvalier politics: "Inadequate structure and planning of public administration; an absence of skilled professionals; an inadequate educational system; problems with aid from external sources; a disorganized and probably corrupt fiscal system." *Id.*

128. *Id.*

129. *Id.* at 509.

130. *Id.* at 477, 480-82, 508-09.

131. See 8 U.S.C. §§ 1101(a)(42), 1253(h) (Supp. IV 1980).

not control.<sup>132</sup> This requirement contemplates that the alien demonstrate that, because of prior political action, the government would single out the alien upon return to the country.<sup>133</sup> If an alien would not be singled out, but would merely be subject to the same governmental oppression as all citizens, the alien would not be considered subject to persecution.<sup>134</sup>

Early views of what actions constituted persecution were based on the pre-1965 standard under section 243(h), "physical persecution."<sup>135</sup> Under this standard, courts agreed that persecution inflicted on an alien who had returned from abroad would support a section 243(h) request if the persecution consisted of confinement, torture, death, or extreme economic sanctions.<sup>136</sup> In 1965, the standard under section 243(h) was amended to require a showing of a well-founded fear of persecution on account of political opinion rather than a showing of threatened bodily harm.<sup>137</sup> This amendment shifted the emphasis from the consequences or the type of the persecution to the motivation underlying the persecution.<sup>138</sup>

After the 1965 amendment, the Ninth Circuit in *Kovac v. INS*<sup>139</sup> broadly defined the manner of persecution sufficient for an asylum request as "the infliction of suffering or harm upon those who differ (in race, religion, or political opinion) in a way regarded as offensive."<sup>140</sup> The *Kovac* court examined the INS's denial of a request for section 243(h) relief made by a Yugoslavian who deserted his ship, immediately sought political asylum in the United States, and feared persecution if returned to Yugoslavia for his denunciation of communism. The petitioner feared economic retaliation because of his request for political asylum. The court agreed that "a probability of deliberate imposition of substantial economic disadvantage upon an alien for reasons of race, religion or political opinion" would support a section 243(h) request.<sup>141</sup> Thus, persecution has been broadly defined to include the infliction of suffering or harm or the imposition of economic

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132. See *McMullen v. INS*, 658 F.2d 1312, 1315 (9th Cir. 1981).

133. See *Fleurinor v. INS*, 585 F.2d 129, 134 (5th Cir. 1978); *In re François*, 15 I. & N. Dec. 534 (1975); *In re Joseph*, 13 I. & N. Dec. 70 (1968); see also *In re Williams*, 16 I. & N. Dec. 697 (1979).

134. See *In re Surzycki*, 13 I. & N. Dec. 261, 262 (1969).

135. Immigration and Nationality Act of 1952, ch. 477, § 243(h), 66 Stat. 163, 214. See notes 30-36 & accompanying text *supra*.

136. See notes 31-33 & accompanying text *supra*.

137. Act of Oct. 3, 1965, Pub. L. No. 89-236, § 11(f), 79 Stat. 911, 918.

138. *Kovac v. INS*, 407 F.2d 102, 107 (9th Cir. 1969). See notes 37-40 & accompanying text *supra*.

139. 407 F.2d 102 (9th Cir. 1969).

140. *Id.* at 107.

141. *Id.*

disadvantage.<sup>142</sup>

### Traditional Views of Political Action

To obtain political asylum, an alien, in addition to demonstrating that he or she may be subject to conduct that constitutes persecution, must show that the persecution results from his or her political actions.<sup>143</sup> Although what constitutes persecution may be clear, what constitutes political action is much less well defined. The determination whether an action is politically motivated takes into account both the form and the timing of the action.

In the development of the standards for asylum, actions did not satisfy the political action requirement if they fell outside a narrow category of activities that were a response to the way political power was distributed and wielded in a country.<sup>144</sup> The conventional definition of political action included only actions by a government and by an alien that were considered political actions in the United States.<sup>145</sup>

Actions also did not satisfy the political action requirement if they

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142. See also A. GRAHL-MADSEN, STATUS OF REFUGEES 201 (1966): "[T]here is precedent for considering the following measures or sanctions 'persecutions' in the sense of the Refugee Convention, provided that the circumstances warrant it: (1) Threats to a person's life; (2) Imprisonment or other forms of detention or internment for a period of three months or more, it remaining an open question whether deprivation for shorter periods may constitute 'persecution'; however, deprivation of liberty for 10 days or less has been deemed not to amount to 'persecution'; (3) Numerous arrests or summonses for interrogation; (4) Removal to a remote or designated place, within the home country; (5) Infliction of bodily harm and serious threats to a person's health . . . ."

143. McMullen v. INS, 658 F.2d 1312, 1315 (9th Cir. 1981).

144. Courts sought evidence of membership in an organized political body, see, e.g., Martineau v. INS, 556 F.2d 306, 307 (5th Cir. 1977) (per curiam); Gena v. INS, 424 F.2d 227, 233 (5th Cir. 1970); *In re Williams*, 16 I. & N. Dec. 697, 701 (1979), active opposition to the Duvalier regime, see, e.g., Gena v. INS, 424 F.2d at 233; *In re Williams*, 16 I. & N. Dec. at 701; *In re Joseph*, 13 I. & N. Dec. 70, 70 (1968), or some other "political affiliation" in the home country, see, e.g., Henry v. INS, 552 F.2d 130, 131 (5th Cir. 1977).

145. For example, in *Gena v. INS*, 424 F.2d 227 (5th Cir. 1970), a Haitian sought § 243(h) relief, alleging that his fear to return to Haiti was based on an altercation with a member of the Tontons Macoutes. The court found that the Haitian had submitted no evidence concerning membership in a political organization, "political affiliations" or activity, or opposition to the Duvalier regime while in Haiti. Although not well defined by the court, these activities generally would be considered political, or in response to the country's political structure, if they occurred in the United States. The court did not consider whether the actions alleged by the Haitian might be considered political when viewed in the context of Haitian culture. See also, e.g., *Henry v. INS*, 552 F.2d 130, 131 (5th Cir. 1977) (petitioner and family had no political affiliations in Haiti); *In re Williams*, 16 I. & N. Dec. 697, 701 (1979) (petitioner "never belonged to any organizations hostile to the interests of Haiti, [and] . . . never expressed any political opinions or acted in a manner which was regarded by the Haitian authorities as opposed to the interests of that country"). In *Coriolan v. INS*, 559 F.2d 993, 1001 (5th Cir. 1977), the Fifth Circuit rejected the assumption of the immigration judge "that people without overt political activity, or minority political opinions, are likely to be the victims of political persecution." See notes 210-15 & accompanying text *infra*.

were taken after the alien's departure from the country. Courts have required some evidence of political action prior to departure from the home country before granting an alien's political asylum claim.<sup>146</sup>

Reviewing the denial of a Haitian's request to reopen deportation procedures for the submission of additional evidence of a section 243(h) request, the Fifth Circuit in *Gena v. INS*<sup>147</sup> refused to reopen the proceedings because the Haitian had not presented evidence showing that he, or any member of his family, had ever opposed the Duvalier regime or belonged to any political organization while in Haiti.<sup>148</sup> The petitioner was a Haitian who sought political asylum in the United States. In the first deportation hearing, he testified that he left Haiti because his wife had trouble with the Tontons Macoutes and because he had fought with the Tontons Macoutes. He had never been arrested in Haiti, however, and was not a member of a political organization. In later testimony, he alleged that he opposed the Duvalier regime and that his departure from Haiti was motivated by fear that his political opposition would result in harm.<sup>149</sup> The court rejected this testimony as unsupported by evidence. As the Haitian's conclusory statement was the only basis for the claim of affiliation, the court dismissed the petition for review.<sup>150</sup>

The Fifth Circuit examined the asylum claims of nine other Haitians in *Paul v. INS*.<sup>151</sup> Stating that aliens must prove that their departure was "politically motivated"<sup>152</sup> to be granted asylum, the court denied the Haitians' petition. In dissent, Judge Godbold examined the Haitians' testimony in detail, stating that, as the petitioners' statements were the only evidence, the real issue was the credibility of the witnesses.<sup>153</sup> Judge Godbold examined a State Department telegram admitted into evidence that concluded that the petitioners "make no claim to prior persecution, imprisonment, or political affiliation before their departure from Haiti."<sup>154</sup> The immigration judge's apparent reli-

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146. See *Paul v. INS*, 521 F.2d 194, 196-97 (5th Cir. 1975); see also *Blazina v. Bouchard*, 286 F.2d 507 (3d Cir.), cert. denied, 366 U.S. 950 (1961); *In re Janus & Janek*, 12 I. & N. Dec. 866 (1968); *In re Nghiem*, 11 I. & N. Dec. 541 (1966).

147. 424 F.2d 227 (5th Cir. 1970).

148. *Id.* at 233.

149. *Id.* at 229-30.

150. The court was not oblivious to the self-serving nature of the Haitian's claim of political affiliation. "With respect to his application for withholding deportation to Haiti, [the petitioner] stated for the first time that his political beliefs 'are opposed to the present government in Haiti,' . . . In addition, for the first time he ascribed political significance to the fight with the assistant chief of the Tonton Macoute . . . ." *Id.* at 230 (emphasis added).

151. 521 F.2d 194 (5th Cir. 1975).

152. *Id.* at 196.

153. *Id.* at 204 (Godbold, J., dissenting).

154. *Id.*

ance on this telegram<sup>155</sup> suggests that to obtain political asylum an alien should show prior persecution, imprisonment, or political affiliation. Based on his examination of the petitioners' testimony, however, Judge Godbold concluded that petitioners met their burden of proving sufficient prior political action.<sup>156</sup>

In *In re Williams*,<sup>157</sup> the Board of Immigration Appeals reviewed the denial of a Haitian's section 243(h) request. The Board concluded that the respondent failed to meet her burden of establishing the claim for section 243(h) relief. The Board relied on the fact that the respondent "never expressed any political opinions nor took any actions which the Haitian Government regarded as opposed to the interests of that country, joined no political organizations, and made no claim that repercussions resulted to her family in Haiti because of her opinions, her actions or her departure in 1970."<sup>158</sup>

Thus, before granting political asylum, courts historically have sought evidence of traditional political activities, such as joining political organizations, expressing political opposition to the government, being subject to prior imprisonment or persecution for political expression, or having some other political affiliation in the home country that will result in persecution if the alien returns there.<sup>159</sup> These actions all fall within a conventional definition of a political action: an act that responds to the political structure of a country or to the way in which power is distributed and wielded.<sup>160</sup> This definition, as applied to aliens who come from cultures different from that of the United States,

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155. See *id.* at 205.

156. "If the statements, or substantial parts of them, are accepted as credible, the conclusion that petitioners failed to meet the burden of proof is, to put it baldly, astonishing." *Id.* at 204.

157. 16 I. & N. Dec. 697 (1979).

158. *Id.* at 701.

159. See also *Martineau v. INS*, 556 F.2d 306, 307 (5th Cir. 1977) (per curiam) (petitioner, a Haitian, presented no evidence of political persecution; petitioner testified that she "was not a member of any political party or the armed forces"); *Henry v. INS*, 552 F.2d 130, 131 (5th Cir. 1977) (petitioner proved no political affiliations); *In re François*, 15 I. & N. Dec. 534 (1975) (respondent not politically active in Haiti).

160. Commentators have noted a similarity between political asylum and the "political offender" exception from extradition. See, e.g., Epps, *The Validity of the Political Offender Exception in Extradition Treaties in Anglo-American Jurisprudence*, 20 HARV. INT'L L.J. 61 (1979); Note, *Section 243(h) of the Immigration and Nationality Act of 1952 as Amended by the Refugee Act of 1980: A Prognosis and a Proposal*, 13 CORNELL INT'L L.J. 291 (1980); Note, *Political Asylum in the United States: A Failure of Human Rights Policy*, 9 RUT.-CAM. L.J. 133 (1977). One commentator identified three prevalent definitions of political offense in the context of the extradition exception: (1) an offense that is part of an organized political activity; (2) an offense committed with predominantly political characteristics; and (3) an act justifying nonextradition in order to avoid political persecution, either because the alien sought to escape from political persecution when he or she committed the offense for which extradition is sought, or because extradition would result in subjecting the alien to political persecution. *Id.* at 143-47.

however, may be so narrow that it excludes aliens who would be subject to persecution for actions that the United States may seek to protect, such as assertions of basic human rights. An alien who can demonstrate persecution in response to other activities, not conventionally considered political, such as the petitioner in *Gena* who fought with a member of the Tontons Macoutes, cannot obtain political asylum unless the definition of political action is broadened to include other factors.

Moreover, as some decisions of the courts and the Board have indicated that an alien must show political action prior to departure from the home country,<sup>161</sup> an alien who never took part in political activity in opposition to the government of the home country until after leaving the country would not merit political asylum. The Board noted in *In re Nghiem*,<sup>162</sup> "For the most part [we have] not considered that joining protest groups and making public statements after entering the United States supports a withholding of deportation under section 243(h)."<sup>163</sup> Only if this definition is broadened to include actions taken after departure can such an alien obtain political asylum.

#### Expanded Views of Timing of Political Action

Distinctions in timing between political action at home and political action abroad arguably should make no difference in the granting of asylum if the alien can show that the political action would result in mistreatment upon return home. For refugees such as Haitians, the problem of timing cannot be separated from the problem of defining what constitutes political action, because the act of leaving Haiti, if illegal, and actions taken after leaving may result in persecution upon return. Such actions, however, may not form a basis for asylum, because they were not taken in Haiti and because they are not political under the conventional definition of political action.

#### *Illegal Departure*

Upon returning to his or her homeland, an alien may be prosecuted for illegal departure from that country.<sup>164</sup> The character and ap-

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161. See note 146 & accompanying text *supra*.

162. 11 I. & N. Dec. 541 (1966).

163. *Id.* at 544; see also *Blazina v. Bouchard*, 286 F.2d 507 (3d Cir.), *cert. denied*, 366 U.S. 950 (1961) (under pre-1965 standard of physical persecution, the court noted that the plaintiff did not allege that he openly avowed dislike of communism while in Yugoslavia or on board ship before he jumped ship; § 243(h) request denied); *In re Janus & Janek*, 12 I. & N. Dec. 866, 872 (1968) ("We have not regarded with favor an applicant whose first indication of opposition to the political regime of the country he left is made after arrival in the United States.").

164. The courts have considered many variations of illegal departure in the context of § 243(h) requests, including desertion from ship, see, e.g., *Blazina v. Bouchard*, 286 F.2d 507

plication of the law authorizing such prosecution determines whether the prosecution constitutes political persecution within the scope of section 243(h). In determining when an alien may obtain asylum for a violation of a statute, a court may examine several factors: (1) the kind of statute involved, (2) the alien's motivation for violating the statute, (3) the application of the statute, (4) the motivation of the government in passing and enforcing the statute, and (5) the severity of the punishment imposed for a violation of the statute.

In *Blazina v. Bouchard*,<sup>165</sup> a Yugoslavian sailor who had deserted ship sought to stay in the United States under the pre-1965 version of section 243(h), claiming "physical persecution."<sup>166</sup> The court found that the possible punishment for his desertion did not constitute persecution, relying principally on two grounds: first, the potential sentence—three months' imprisonment—would not constitute physical persecution;<sup>167</sup> and second, imprisonment for jumping ship was deemed "to be a criminal sanction that is reconcilable with generally recognized concepts of justice."<sup>168</sup>

The plaintiff testified that he would be imprisoned if returned to Yugoslavia because he fled from there, "and those who do that are punished."<sup>169</sup> The court inferred from this statement that the prison term would be given in response to the plaintiff's desertion of ship.<sup>170</sup> The plaintiff also alleged, however, that he would be subject to persecution because his desertion indicated an anticommunist feeling, and the government would persecute him for the expression of this feeling. The court implied that a politically motivated defection might form the basis for withholding of deportation,<sup>171</sup> but did not examine the plaintiff's allegation, thereby avoiding the further question whether desertion could be an expression of political opinion that would provide a foundation for section 243(h) relief. Refusing to overrule the Attorney General's decision to deny section 243(h) relief,<sup>172</sup> the court stated that it was within the Attorney General's discretion to determine whether the

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(3d Cir.), *cert. denied*, 366 U.S. 950 (1961); note 173 *infra*, violation of a prohibition against illegal departure, *see, e.g.*, *Sovich v. Esperdy*, 319 F.2d 21 (2d Cir. 1963), and defection, *see, e.g.*, *In re Janus & Janek*, 12 I. & N. Dec. 866 (1968).

165. 286 F.2d 507 (3d Cir.), *cert. denied*, 366 U.S. 950 (1961).

166. Immigration and Nationality Act of 1952, ch. 477, § 243(h), 66 Stat. 163, 214.

167. 286 F.2d at 511. This basis stems from the court's interpretation of the pre-1965 standard. "The phrase 'physical persecution' should be taken to mean confinement, torture or death inflicted on account of race, religion, or political viewpoint." *Id.*

168. *Id.*

169. *Id.* at 509.

170. *Id.*

171. "This contention [that desertion indicates anticommunist feeling, the expression of which would subject the plaintiff to physical persecution in Yugoslavia] poses a question the resolution of which is well within the province of the Attorney General." *Id.* at 511-12.

172. *Id.* at 512.



plaintiff satisfied the requirements of that section.<sup>173</sup>

The holding in *Blazina* that desertion of ship does not give rise to a section 243(h) claim was confirmed in *Blagaic v. Flagg*.<sup>174</sup> In *Blagaic*, the court considered the section 243(h) request of a Yugoslavian who deserted ship, and held that the immigration officer did not abuse his discretion in denying the petitioner's section 243(h) request. The petitioner testified that he feared persecution if returned to Yugoslavia because he deserted ship and that he deserted ship because he feared reprisal for his refusal to join the communist party aboard ship.<sup>175</sup> Ignoring the petitioner's motivation for deserting ship, the court stated that "[w]hether such desertion is an offense under Yugoslav law is irrelevant, because punishment for a non-political crime" is not within the scope of section 243(h).<sup>176</sup> The *Blagaic* court thus implied that only punishment for a political crime would constitute persecution and that the alien's motivation for violating the statute, which resulted in punishment, was irrelevant.

A ruling by an INS Special Inquiry Officer that punishment for illegal departure may never constitute "physical persecution" was reversed in *Sovich v. Esperdy*.<sup>177</sup> In *Sovich*, the appellant had escaped from Yugoslavia and had fled to Italy, where he was received as a refugee. Eventually, he came to the United States and sought section 243(h) relief from deportation, claiming that he feared imprisonment, if returned to Yugoslavia, for his anticommunist beliefs and statements and for his illegal departure from Yugoslavia.<sup>178</sup> The Special Inquiry Officer ruled that persecution does not include imprisonment for illegal departure, which is a "conviction for a crime cognizable under the recognized juridical system."<sup>179</sup> The court reversed, however, concluding that, although not all incarceration, even if for political crimes, would constitute physical persecution,<sup>180</sup> it was erroneous to rule that incarceration for illegal departure may never constitute physical persecution

173. *Id.* at 511-512. Possible punishment for jumping ship was also a basis of the § 243(h) claim of the Yugoslavian sailor in *Diminich v. Esperdy*, 299 F.2d 244 (2d Cir.), *cert. denied*, 369 U.S. 844 (1961). The *Diminich* court agreed with the *Blazina* court, finding no basis for the § 243(h) claim. *See also* *Chao-Ling Wang v. Pilliod*, 285 F.2d 517, 520 (7th Cir. 1960) ("prosecution before a military tribunal convened pursuant to laws of a foreign state to try offenses committed by a member of the military forces of that country" would not constitute physical persecution under § 243(h)).

174. 304 F.2d 623 (7th Cir. 1962). The case also was based on the pre-1965 standard of § 243(h), physical persecution.

175. *Id.* at 627.

176. *Id.*

177. 319 F.2d 21, 29 (2d Cir. 1963); *accord* *Coriolan v. INS*, 559 F.2d 993 (5th Cir. 1977).

178. 319 F.2d at 23.

179. *Id.* at 27 (quoting recommendation of Special Inquiry Officer).

180. *Id.* at 29.

and thus may never serve as the basis for section 243(h) relief.<sup>181</sup>

In reaching this conclusion, the court analyzed two assumptions underlying the holding of the Special Inquiry Officer that punishment after conviction for a crime cognizable under the recognized judicial system may not constitute persecution.<sup>182</sup> First, the court agreed that punishment for a traditional crime would not ordinarily be within the scope of section 243(h) because Congress had no intent in enacting that law to provide a refuge for common criminals. Analogizing to Hitler's use of a legal system for carrying out his atrocities, however, the court suggested that a recognized judicial system may encompass punishment that amounts to physical persecution.<sup>183</sup> Thus, the prohibition within a legal system of illegal departure may constitute punishment within the meaning of section 243(h).

Second, the *Sovich* court analyzed the Special Inquiry Officer's interpretation of section 243(h). Criticizing his assumption that the violation of a prohibition against illegal departure is not politically motivated and thus is outside the scope of section 243(h), the court stated that, in western societies, a general prohibition against departure from a country is not traditional, and that such a prohibition is a "product of modern dictatorships able to control long borders and the movements of their people within them."<sup>184</sup> The court suggested that, because one who agrees with the government would not violate the prohibition, the punishment of one who does leave is politically motivated and may constitute punishment because of political opinion.<sup>185</sup> Therefore, the *Sovich* court found that punishment for violation of a general prohibition against illegal departure, although the prohibition is part of a "recognized juridical system," may fall within the scope of section 243(h) if the motivation of the person who violates the prohibition is political.<sup>186</sup>

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181. *Id.*

182. *Id.* at 28.

183. *Id.*

184. *Id.*

185. *Id.*

186. Dissenting in *Sovich*, Judge Moore contended that the appellant did not prove that Yugoslav laws make "escape" a crime, that the government of Yugoslavia punishes people for the violation of this crime, or that the punishment for the violation that would be inflicted on the appellant upon his return would be severe. *Id.* at 34 (Moore, J., dissenting). Thus, Judge Moore concluded that there was no basis for the majority's discussion of the prohibition.

In addition, Judge Moore stated that prosecution for the violation of a crime would fall within the scope of section 243(h) only if the law were applied discriminatorily or the alien violated the law because of persecution or a fear of persecution on account of political opinion. The majority's distinction, according to Judge Moore, is merely between escape by desertion and escape by fleeing across the border: prohibition for the former might exist in a civilized country, but prohibition for the latter would only exist in a totalitarian country. *Id.* at 36. This distinction, however, would lead to inconsistent results: An alien who deserted

Under the foregoing cases, an alien seeking asylum can base his or her asylum request upon the possibility of punishment for having departed illegally from the country. This punishment must be political; it is unclear, however, what aspects of the punishment must be political to ensure that the alien fears persecution for political opinion. In *Blazina*, the alien deserted his ship for political reasons, alleging that imprisonment for desertion would constitute physical persecution within the scope of section 243(h). The court disagreed, stating that punishment for desertion is not within the scope of section 243(h), and ignoring the alien's allegation that he deserted because of political opinion. The *Blazina* court seemed to recognize, however, that defection, a political act, would fall within the scope of section 243(h). In *Blagaic*, the court ignored the alien's political motivation for desertion, suggesting that only punishment for the violation of a political prohibition, that is, a prohibition passed by the government for a political reason, would be within the scope of section 243(h). In *Sovich*, the court addressed the political basis of an illegal departure, finding that an alien who had a political motivation for violating the prohibition would fall within the scope of section 243(h), but did not clarify whether the alien must also demonstrate that the government had a political motive for promulgating or enforcing the prohibition.

In addition to distinguishing between political and nonpolitical punishments, courts and the Board of Immigration Appeals have distinguished between a government's motive in passing a law and an alien's motive in violating it. In *In re Janus & Janek*,<sup>187</sup> the Board approved the section 243(h) requests of two Czechoslovakians who had been tried and sentenced in absentia for their defection from Czechoslovakia. Noting that "[t]he act of defection normally has political, rather than criminal, connotations,"<sup>188</sup> the Board distinguished a statute prohibiting defection from a statute imposing criminal sanctions for unauthorized travel. The former is a political statute; the latter is a political statute only if its provisions are political or if it is administered in a political manner. The Board, however, emphasized the political motivation that each defendant had in defecting, rather than the gov-

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his or her ship would be denied asylum, whereas an alien who fled across the border would be granted asylum, although both had the same motivation for fleeing the country. *Id.* at 37. Thus, Judge Moore stated that the inquiry should be whether the alien will be prosecuted under the law because of his or her political opinions, which would provide a basis for asylum, or because the alien fled the country to avoid this type of oppression, which would not. *Id.*

187. 12 I. & N. Dec. 866 (1968).

188. *Id.* at 873. The Board noted that the conviction of Janek involved other facets of his life, including failure to act as a good citizen in defecting and the taking "advantage of confidence" shown in him, which suggests that the statute did not "have travel control as its prime concern." *Id.*

ernment's motivation in promulgating the statute.<sup>189</sup>

In *Coriolan v. INS*,<sup>190</sup> the Fifth Circuit examined the motivations of both the government and the alien in the context of an allegation that punishment for illegal departure from Haiti was within the scope of section 243(h). The court examined the immigration judge's denial of the section 243(h) requests of two Haitians, Coriolan and Bonannee. At least partially because their departure from Haiti was illegal, both feared imprisonment or death if they returned. Although the Haitians' asserted fear of prosecution was supported only by general allegations of Haitian policy,<sup>191</sup> the immigration judge had conceded that the Haitians might face prosecution in Haiti. As the immigration judge had not made clear the basis for his decision, the *Coriolan* court was unsure of the basis for the denial of section 243(h) relief.

The *Coriolan* court stated that the immigration judge may have based his conclusion on a finding that the petitioners did not leave Haiti for political reasons, but concluded that the immigration judge was incorrect if he had assumed that prosecution for illegal departure can never amount to political persecution.<sup>192</sup> Under *In re Janus & Janek*, an individual's lack of a political motive for departure might be fatal to the section 243(h) requests even if the government's motive for its response was political.<sup>193</sup> The court suggested, however, that it would reject the *Janus & Janek* test: "Whether this would be the view taken by this court is more doubtful. The motive test, after all, on its face does *not* test whether the government's motive for persecution is political."<sup>194</sup>

Thus, the *Coriolan* court rejected the requirement that an alien show that his or her departure was motivated by political opinion. After *Coriolan*, persecution based on a fear of punishment for illegal departure could be the basis of a request for asylum, as long as the statute was passed by the government for political reasons.<sup>195</sup>

In *Haitian Refugee Center*, Judge King described the Haitian legal system as one under which "the criminal statutes are so broad and ambiguous as to encompass virtually any act (or thought)."<sup>196</sup> Departure from Haiti without the prescribed government authorization could be an illegal act. More importantly, Judge King described how Haitians

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189. *Id.* at 873-75.

190. 559 F.2d 993 (5th Cir. 1977).

191. *Id.* at 1000.

192. *Id.*

193. *Id.*

194. *Id.* (emphasis in original).

195. In *Coriolan*, however, the petitioners alleged other bases for their fears of persecution in Haiti. Thus, the court relied on more than the potential prosecution for illegal departure in reversing the immigration judge's denial of the petitioner's section 243(h) requests.

196. 503 F. Supp. at 502.

who return to Haiti after an illegal exit suffer a pattern of persecution.<sup>197</sup> In Haiti, illegal departure is a crime that results in punishment.

To use illegal departure as a basis of asylum, a Haitian must show not only that his or her illegal departure may result in punishment, but also that it was politically motivated. Under the early cases, *Blazina* and *Blagaic*, a Haitian had to show that he or she committed a political crime, such as defection, to obtain asylum; merely showing that he or she left the country for political reasons would be insufficient. Under *Sovich*, a Haitian who showed a political reason for leaving would be able to base an asylum claim on the illegal departure. *Sovich* left unclear, however, whether a showing that the government had political motivations for adopting the prohibition would satisfy the requirements for asylum. The *Sovich* court did suggest that the severity of punishment that an alien would face for violating the prohibition would be relevant to an asylum determination. Thus, a Haitian who demonstrates a well-founded fear that return to Haiti would result in severe punishment may have a basis for an asylum request.

Although the Board in *In re Janus & Janek* emphasized the motive of the alien in defecting rather than the government's motive in passing the law, the *Coriolan* court suggested that persecution in the form of prosecution for illegal departure could be the basis of a request for asylum if the government had a political motive for passing or enforcing the statute. Under *Coriolan*, a Haitian who can show that Haitian authorities have a political motive, as defined by that country's political system, for enforcing a prohibition against illegal departures may use the prosecution for illegal departure as a basis for political asylum. If the government's motive for passing or enforcing a law is political, a Haitian should be able to obtain asylum by showing a well-founded fear of persecution for having departed illegally from Haiti.

#### *Claim of Asylum While Abroad*

An alien who will be punished if returned to his or her home country because he or she claimed asylum while abroad may attempt to base a request for asylum on his or her fear of this punishment.<sup>198</sup> This basis for asylum differs from one based on a fear of persecution for having violated a prohibition against illegal departure or against deserting ship. In *Kovac v. INS*,<sup>199</sup> the court distinguished between the petitioner's allegation that he feared punishment for having deserted ship and his allegation that he feared punishment for having sought political asylum in the United States. The petitioner alleged that his

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197. *Id.* at 477-81.

198. See generally Note, *Basing Asylum Claims on a Fear of Persecution Arising from a Prior Asylum Claim*, 56 NOTRE DAME LAW. 719 (1981).

199. 407 F.2d 102 (9th Cir. 1969).

request for political asylum would be considered "open defiance and denunciation of Communism,"<sup>200</sup> and that he would be persecuted for having requested asylum. The court, finding that the Board of Immigration Appeals had applied erroneous legal standards to this and other points, vacated the decision.<sup>201</sup>

*Kovac* illustrates that a claim of asylum abroad that results in punishment upon return to the home country is politically motivated in two ways. First, an individual may express his or her dissent from the home country by requesting asylum abroad. If the request for political asylum constitutes an expression of political dissent, then persecution upon return for having made the request would be persecution for the expression of political opinion. Second, the claim may not be intended as political dissent, but the government of the alien's home country may treat the claim as an expression of political dissent or as an act that is political because other countries may criticize the home government. If the government views the asylum claim as political, its response to the claim in the form of punishment or persecution would constitute a political response. The persecution would then also be on account of political opinion and would support an asylum request.

In *Haitian Refugee Center*, Judge King found that Haitians who returned to Haiti after having claimed asylum abroad were subject to a pattern of persecution for having made this claim.<sup>202</sup> Persons who sought asylum while abroad were viewed as political opponents of the Duvalier regime, as having insulted the Duvalier family and defamed the Haitian nation, and as traitors of the government.<sup>203</sup> Thus, regardless of a Haitian's motive in claiming asylum, he or she became subject to persecution for having made this claim. The persecution was a response to what was deemed to be a political act: expressing opposition to the Haitian government. As such, it constituted persecution for political opinion and should have supported an asylum claim.

Arguably, basing a grant of asylum on a fear of persecution because of a prior asylum request would result in self-generating asylum: to obtain asylum, one would have only to request asylum. Allowing self-generating asylum would seem to contravene the purpose of providing refuge for victims of unreasonable and oppressive governmental policies who have fled to avoid persecution<sup>204</sup> by allowing an alien to create a likelihood of persecution for conduct after the alien has left the home country.

The consequences of return to Haiti by a Haitian who is refused

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200. *Id.* at 104.

201. *Id.* at 107.

202. 503 F. Supp. at 477, 480-81.

203. *Id.* at 477, 480.

204. See S. SINHA, ASYLUM AND INTERNATIONAL LAW 95-96 (1971).

asylum, however, can be harsh.<sup>205</sup> For this reason, a Haitian who can demonstrate a well-founded fear of persecution because of his or her asylum request should be granted asylum. The alternative would be inhumane.

Furthermore, self-generating asylum may not contravene the purpose or procedure of asylum. First, a harsh response, such as a Haitian may face, may be an unreasonable and oppressive governmental policy. One goal of asylum is to protect an alien from such policies.<sup>206</sup> Second, a government, such as the Haitian government, that deems an asylum request to be a political statement and punishes an alien for having made this statement is responding to a political act. Thus, persecution in this situation may be deemed to be on account of political opinion, and within the scope of the asylum provisions. An alien in this situation therefore should be entitled to asylum.

### Expanded View of Form of Political Action

#### *Rejection of Traditional Definitions of Political Action*

Prior to *Haitian Refugee Center*, courts sought some action on the part of the alien that demonstrated the alien's objection to the political system of his or her home country.<sup>207</sup> This action traditionally had to occur before the alien's departure from the home country, although actions taken after departure also provided an adequate showing of political action.<sup>208</sup> Conventional definitions of what constitutes political action or political motivation, however, may be inappropriately applied to aliens from a country such as Haiti.<sup>209</sup>

The Fifth Circuit analyzed a conventional definition of political action in the context of Haiti in *Coriolan v. INS*.<sup>210</sup> In *Coriolan*, the immigration judge denied the section 243(h) requests of Coriolan and Bonannee, who had alleged that the Haitian government would retaliate against them for actions they took while in Haiti. Bonannee alleged that his father was suspected of involvement in an anti-Duvalier movement, that a militiaman had recognized him as a member of his father's family at a dance, that he had had a fight with the militiaman, and that

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205. See *Haitian Refugee Center v. Civiletti*, 503 F. Supp. at 482.

206. See S. SINHA, *ASYLUM AND INTERNATIONAL LAW* 95-96 (1971).

207. See text accompanying notes 146-63 *supra*.

208. See text accompanying notes 164-205 *supra*.

209. Nonetheless, some Haitians have obtained asylum under such definitions. See, e.g., *In re Joseph*, 13 I. & N. Dec. 70 (1968); cf. *United States ex rel. Mercer v. Esperdy*, 234 F. Supp. 611 (S.D.N.Y. 1964) (Haitian petitioner's writ of habeas corpus sustained under pre-1965 standard of § 243(h), physical persecution). Between 1972 and 1979, the State Department recommended political asylum for Haitians in more than 240 cases. See *In re Williams*, 16 I. & N. Dec. 697, 703 (1979).

210. 559 F.2d 993 (5th Cir. 1977).

he had been arrested.<sup>211</sup> Coriolan alleged that he, as well as Bonannee, feared persecution for his illegal departure from Haiti and that he had had "small problems" with the police.<sup>212</sup>

The court recognized that, "although Bonannee and Coriolan are likely victims of government persecution, what they face is not persecution for their 'political opinion' as the statute requires."<sup>213</sup> Nonetheless, the court examined the immigration judge's presumption that "people without overt political activity, or minority political opinions, are unlikely to be the victims of political persecution,"<sup>214</sup> and concluded that this presumption is not conclusive. "It may be, in fact, that Haitian citizens can become the focus of government persecution without ever taking any conventionally 'political' action at all."<sup>215</sup>

The *Coriolan* court thus recognized that persecution may result from actions that are not conventionally considered political, and that the actions of the petitioners in the case before it would not conventionally be considered political. Despite the *Coriolan* court's recognition that conventional forms of political action do not include all actions that may give rise to political persecution, an alien who cannot show a well-founded fear of persecution because of actions conventionally considered political probably will not obtain asylum unless the courts continue to broaden the definition of "political."

In *Haitian Refugee Center*, Judge King expanded the range of action that may be considered political. Under the conditions in Haiti as he analyzed them, Judge King suggested that actions that conventionally would not be considered to be politically motivated are in fact so motivated.<sup>216</sup> Three arguments underlie Judge King's suggestion: (1) traditional definitions of political dissent are not applicable in Haiti; (2) because of the absence of a legal system and the prevalence of secret police, the individual official is often confused with the government, and personal encounters may manifest political resistance; and (3) Haitian poverty continues because it is Duvalier's means of maintaining power and is thus a political condition.

#### *Political Dissent More Broadly Defined*

One aspect of political action is that of dissent from the existing political structure of a country.<sup>217</sup> Although it may be assumed that only intellectuals and leaders of political parties may engage in such

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211. *Id.* at 995-96.

212. *Id.* at 995.

213. *Id.* at 1004.

214. *Id.* at 1001.

215. *Id.*

216. *See* 503 F. Supp. at 510.

217. *See* notes 144-45, 157-60 & accompanying text *supra*.



activities,<sup>218</sup> Judge King stated that "[t]he uncontradicted evidence at trial . . . demonstrates that the 'political opposition' [in Haiti] is quite broadly defined."<sup>219</sup>

In contrast to a narrow definition of political dissent as a public expression of opposition by intellectuals or leaders of political parties, in Haiti political dissent may be made by those who have little education or little power to affect political thought. Political dissent may exist in a claim of asylum while abroad.<sup>220</sup> Because of the extent of suppression of public discussion and participation in the political process,<sup>221</sup> an individual's criticism of his or her poverty under the rule of Duvalier may also be political dissent.<sup>222</sup>

Although political dissent is thought of narrowly in the United States, its broader definition in the context of Haiti means that actions not considered political here are political in Haiti, and these actions may cause a Haitian to be punished in Haiti. Although in the United States this punishment may not occur, its existence in Haiti should not be overlooked. Such a Haitian should be entitled to political asylum.

### *The Illusory Distinction Between the Political and the Personal*

Except in the major cities, no judicial system exists in Haiti,<sup>223</sup> and the security forces control all activities without the extrinsic limitation of a rule of law.<sup>224</sup> The absence of a functioning legal system means that what constitutes criminal activity is determined by an individual official;<sup>225</sup> there is no uniform system of rights to be protected.<sup>226</sup>

The security forces exist to aid the government in maintaining its power.<sup>227</sup> Because of this role, the forces are political organizations, which bring politics to the Haitian countryside.<sup>228</sup> As crime is determined on an individual level by an official who represents the Haitian government, an encounter between a citizen and an official, in which the official determines that the individual has engaged in criminal ac-

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218. The State Department team sent to study conditions in Haiti apparently made this assumption. See 503 F. Supp. at 480.

219. *Id.*

220. *Id.*

221. See *id.* at 503-05.

222. See *id.* at 505: "One need not join a political party to be viewed as an opponent of Duvalier. . . . Indeed, one need do very little. Solives Romet testified that his paralytic grandfather and sick father were arrested and disappeared after they failed to attend a public celebration honoring Duvalier. To 'talk bad' about the government is a crime."

223. *Id.* at 501.

224. *Id.* at 498.

225. *Id.* at 502.

226. *Id.* at 503.

227. *Id.* at 498-99.

228. *Id.*

tivity, is a political encounter although it may appear to be a personal encounter.

Judge King quoted at length from the testimony to support this thesis. One Haitian was arrested because he was a friend of someone sought by the government.<sup>229</sup> Another Haitian rented a bicycle to a member of the Tontons Macoutes and was attacked when he asked the man to return the bicycle.<sup>230</sup> Examples also can be found in other cases.<sup>231</sup>

Although these encounters appear to be personal rather than official, the encounters are peculiarly political because a member of the militia, a governmental organization, is one of the participants. In Haiti, the distinction between an official and an unofficial act—between what is political and what is personal—is illusory. Therefore, an encounter conventionally considered personal, such as a dispute between an official and a citizen about the price of a bicycle rented to the official for personal use, may be a political encounter. An alien who faces persecution upon return to Haiti because of such an encounter thus may face persecution on account of political opinion.

#### *Economics as a Political Condition*

Judge King analyzed the economic conditions in Haiti and concluded that its dramatic poverty results from the Duvaliers' efforts to maintain political power.<sup>232</sup> As the economic condition is a result of the political effort to maintain power, the economic condition itself is a political condition. An action that a poverty-stricken Haitian takes to protest the poverty is an action in response to the political condition. A Haitian who criticizes the government for its economic policies thus criticizes a political condition. If a Haitian is persecuted for this action, the Haitian's persecution is for political opinion.

Every poor Haitian, however, does not thereby become a political refugee upon departure from Haiti. Although the status of poverty may be a political condition, it is not persecution. A Haitian who merely is poor and does not express any opposition to the government

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229. *Id.* at 502.

230. *Id.* at 498-99.

231. In *Gena v. INS*, 424 F.2d 227 (5th Cir. 1970), the court analyzed the § 243(h) request of a Haitian who left Haiti after a member of the Tontons Macoutes propositioned and possibly raped his wife. The court noted that the petitioner had not shown that he would be likely to be persecuted because of race, religion, or political opinion, apparently concluding that the encounter between the petitioner and the member of the Tontons Macoutes was merely a private argument. *Id.* at 233. In *Coriolan v. INS*, 559 F.2d 993 (5th Cir. 1977), one petitioner's father was suspected of antigovernment activity. The petitioner had a fight with a militiaman, apparently because the militiaman knew of his father, and was later arrested. *Id.* at 996.

232. 503 F. Supp. at 507-09.

or engage in a dispute for which he or she may be punished will not be subject to persecution on account of political opinion. This Haitian should not have access to asylum.

Because of the relationship between politics and economics in Haiti, the traditional distinction between an economic migrant and a political refugee, as applied in Haiti, is inappropriate.<sup>233</sup> One commentator has stated that a political refugee is "forced to leave or stay out of his state of nationality or habitual residence for political reasons arising from events occurring between that state and its citizens which make his stay there impossible or intolerable . . . ."<sup>234</sup> An economic migrant, on the other hand, "freely chooses to live elsewhere and is capable of having a normal relationship with the authorities of his home country."<sup>235</sup> The essential differences between an economic migrant and a political refugee are the alien's motivations for leaving and the alien's relationship with the home country before and after departure.

A Haitian may leave Haiti for many reasons. It would be difficult to determine whether a Haitian who leaves Haiti in response to economic conditions is "forced to leave" or rather "freely chooses to live elsewhere." If a Haitian leaves absent duress imposed by the government merely because he or she desires a better life elsewhere, the Haitian is not "forced to leave" for political reasons, although the economic reasons for the departure stem from a political act. If, however, a Haitian leaves because of a dispute with a Haitian official, for which the official seeks to punish the Haitian, the Haitian may be forced to leave Haiti for reasons that are political in the context of the conditions peculiar to Haiti.

A Haitian who has left Haiti may be incapable of returning or of having a "normal relationship" with Haitian authorities because of the Haitian government's treatment of those who return from abroad, particularly those who have claimed asylum abroad.<sup>236</sup> Under the conventional distinction between economic migrant and political refugee, therefore, many Haitians may be political refugees.

In *Haitian Refugee Center*, Judge King noted that a broad classification of all Haitians as economic refugees is inappropriate, but stated that limits must be placed on the classification of Haitians as political refugees.<sup>237</sup> Judge King distinguished certain situations that "take on a

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233. For a discussion of the distinction between economic and political refugees in the Haitian context, see Dernis, *Haitian Immigrants: Political Refugees or Economic Escapees?*, 31 U. MIAMI L. REV. 27 (1976).

234. S. SINHA, ASYLUM AND INTERNATIONAL LAW 95 (1971).

235. *Id.* at 96.

236. See notes 202-03 & accompanying text *supra*.

237. See 503 F. Supp. at 509. "It would certainly be inappropriate to conclude that all poor Haitians are entitled to political asylum. Virtually the entire country could make such a claim."

political color";<sup>238</sup> claims based on these actions warrant asylum. To illustrate this idea, Judge King described the encounter of a Haitian, Solomon Jocelyn, with the Prefect of the Tontons Macoutes.<sup>239</sup> Jocelyn, the president of a farmers' labor union, wrote a letter to the Prefect of the Tontons Macoutes protesting the expropriation of land by the Tontons Macoutes. Jocelyn was jailed for this action. After he came to the United States, the INS classified Jocelyn's section 243(h) request as "clearly lacking in substance" because it was based on a personal dispute;<sup>240</sup> this encounter, however, took place in the context of François Duvalier's attempt to gain power by the general suppression of labor unions. Thus, although the INS treated Jocelyn's claim as nonpolitical, the claim took on a political color and warranted section 243(h) relief.

In giving Jocelyn's case as an example, Judge King assumed that the activity for which Jocelyn was sanctioned was "essentially economic."<sup>241</sup> Arguably, Jocelyn's case would be considered political even under conventional definitions<sup>242</sup> because Jocelyn was the victim of a planned program to suppress the political opposition of labor unions. If Jocelyn's case would meet traditional definitions of political action, then his case is not a good illustration of Judge King's thesis, because the thesis relies on actions that would be considered economic rather than political but which take on a political color because of conditions in Haiti.

A better example of Judge King's thesis is that of Odilius Jean, a Haitian who rented a bicycle to a member of the Tontons Macoutes and was attacked by this official when he sought to retrieve the bicycle.<sup>243</sup> Because Jean did not criticize the government or otherwise express political dissent, his subsequent persecution would not conventionally be considered to be because of political opinion. Jean's encounter with the member of the Tontons Macoutes was personal; the official did not act as a representative of the government in stealing the bicycle and attacking Jean. Finally, Jean's encounter was also essentially economic; the dispute centered on ownership of a bicycle that Jean rented to the member of the Macoutes but that the member maintained he had purchased by paying the daily rental price.<sup>244</sup>

The test of Judge King's thesis thus lies in a situation such as that of Odilius Jean, rather than that of Solomon Jocelyn. If Jean can show a well-founded fear of persecution based on this dispute, a court must

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238. *Id.*

239. *Id.* at 509-10.

240. *Id.* at 510.

241. *Id.*

242. See text accompanying notes 159-60 *supra*.

243. 503 F. Supp. at 499.

244. *Id.*

confront the question whether the dispute illustrates political action. First, the dispute is not one conventionally considered to be political; Jean did not join any political organizations, take any actions that the Haitian government regarded as opposed to the interests of the country, or express a political opinion.<sup>245</sup> In a conventional sense, persecution that Jean may face because of this dispute would not be persecution for political opinion.

Second, a court may analyze his claim of asylum in light of *Haitian Refugee Center*. Rejecting the conventional limitations on the definition of political opinion, a court could analyze the conditions in Haiti to find that the absence of a legal system, by allowing arbitrary enforcement of rules determined on an individual basis and by allowing an individual official to represent the government, can make personal encounters political.<sup>246</sup> Although Jean's encounter concerned the ownership of a bicycle, which is in essence an economic dispute, economic oppression in Haiti, enforced by members of the militia, is a strategy to maintain political power. Such economic oppression is thus political action. These two aspects of Haitian culture—the failure to distinguish an individual from his or her official government position and the enforcement of economic oppression to maintain political power—could support a finding that Jean's dispute with the member of the Macoutes was a political dispute, and that the punishment Jean will face because of this dispute constitutes persecution on account of political opinion.

Third, Jean may have taken actions after this dispute, such as departing illegally or claiming asylum while abroad, that would result in persecution on return to Haiti because of the Haitian government's treatment of the actions as political. If so, these actions and the resulting potential for persecution may justify a claim of asylum apart from the dispute between Jean and the member of the Tontons Macoutes. A court may consider together these later actions and the persecution that Jean faces because of the original dispute to find that Jean has shown a well-founded fear of persecution on account of political opinion.

### Conclusion

A court unwilling to broaden the concept of political persecution to include the analysis suggested by Judge King in *Haitian Refugee Center* and yet desirous of avoiding sending an alien such as Odilius Jean back to his or her home country may rely on dicta from *Coriolan v. INS*: "We cannot believe . . . that Congress would have refused sanctuary to people whose misfortune it was to be the victims of a government which did not require political activity or opinion to trigger its

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245. See notes 159-60 & accompanying text *supra*.

246. See text accompanying notes 223-31 *supra*.

oppression.”<sup>247</sup> Nonetheless, the *Coriolan* court recognized that the provision for political asylum may not protect from persecution all those who deserve protection.

The humanitarian approach suggested by the *Coriolan* court is consistent with previous United States human rights policy, but is not mandated by the political asylum provision. This provision has been broadly interpreted by the courts to encompass many aliens who would be persecuted if returned to their home countries, but who do not fall within the traditional definitions of “political refugee.” It has not been interpreted as a broad category for the protection of masses of aliens, but as a selective provision that will protect a few aliens who qualify for its protection on an individual basis.<sup>248</sup>

The United States historically has welcomed refugees from many lands. Today, with the great influx of refugees from many parts of the world, the United States is less willing to accept refugees. The political and moral problem of providing for the massive influx of refugees has been placed in the courts through the political asylum provision. The courts, however, are already overburdened and should not be forced to solve the refugee problem. A better method of protecting large groups of refugees, such as Haitians, would be to enact special legislation that would grant asylum to those who flee oppressive dictatorships that ignore basic human rights.<sup>249</sup>

Faced with thousands of requests for asylum by Haitian refugees, a court has few options. It may rely on conventional definitions of political persecution to send Haitians back to suffer likely persecution in Haiti. It may broaden the concept of political action to encompass acts taken in leaving or after leaving Haiti, such as illegal departure and claiming asylum while abroad, which the Haitian government treats as political. It may cast aside the conventional definitions of political action to adopt Judge King’s thesis that, in conditions peculiar to Haiti, disputes that are personal or essentially economic are political

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247. 559 F.2d 993, 1004 (5th Cir. 1977).

248. “Traditionally, the American people have responded generously to the individual needs of all homeless refugees wherever they have been found. But group refugee admissions have generally been concerned with classes of refugees from countries where, for example, the United States has had strong historic or cultural ties, or where we have been directly involved or have had treaty obligations.” S. REP. NO. 256, 96th Cong., 2d Sess. 6, reprinted in 1980 U.S. CODE CONG. & AD. NEWS 141, 146.

249. Section 101(b) of the Refugee Act of 1980 states that one objective of the Act is to “provide a permanent and systematic procedure for the admission to this country of refugees of special humanitarian concern to the United States . . .” Pub. L. No. 96-212, § 101(b), 94 Stat. 102, 102. The Senate Report accompanying the Act states that “what refugees will be deemed of special concern to the American people will be a public policy issue that will be, as it is now, debated and reviewed continuously by Congress, the President, and the American people.” S. REP. NO. 256, 96th Cong., 2d Sess. 6, reprinted in 1980 U.S. CODE CONG. & AD. NEWS 141, 146.

and can lead to political persecution. Finally, a court may step outside its role as an interpreter of the asylum laws and declare that, although aliens do not meet the political asylum standard, they should not be refused asylum because such refusal would contravene the United States' strong commitment to human rights.

Within this framework, courts and the INS must decide the political asylum claims of individuals. A better solution than forcing these institutions to decide, possibly, between life and death for aliens such as Haitians would be to provide special legislation for them in this country while working to effect an international, humanitarian solution to their problem. Until this is done, the institutions given the task of determining asylum claims must do so in a humanitarian way, recognizing that, in cultures outside of the United States, there may not be a neat distinction between that which is political and that which is economic or personal.

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